

(2018) 07 UK CK 0175

In the Uttarakhand High Court

Case No : Special Appeal No. 190 Of 2018, Stay Vacation Application No. 9355 Of 2018

M/s Kothari Associates

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 25-07-2018

Acts Referred:

Uttarakhand Procurement Rules, 2008 — Rule 3(9)
Constitution Of India, 1950 — Article 14

Citation : (2018) 07 UK CK 0175

Hon'ble Judges : K.M. Joseph, CJ; Sharad Kumar Sharma, J

Bench : Division Bench

Advocate : Rakesh Thapliyal, Ranjan Ghildiyal

Final Decision : Dismissed

Judgement

K.M. Joseph, CJ

1. Appellant is the writ petitioner.

2. By e-tender notice dated 22.11.2017, the Superintending Engineer called for tenders in respect of construction of residential and non-residential buildings. Including the appellant, there were six contractors, who participated. Out of them, only two were found to be technically responsive, including the appellant. Accordingly, the financial bid of the appellant was opened on 23.02.2018. Appellant was found to be L-1. However, the respondents decided to go in for a re-tender after cancelling the earlier tender. This occasioned the filing of the writ petition, wherein the following reliefs were sought:

"I. Issue a writ, order or direction in the nature of certiorari for quashing the impugned e-tender corrigendum dated 15.03.2018 and the fresh e-tender notice dated 20.03.2018 (Annexure Nos. 5 & 6 to the writ petition).

II. Issue a writ, order or direction in the nature of mandamus commanding the respondents to issue the work order to the petitioner keeping in view of the fact

that the petitioner was declared as L-1 pursuant to the tender notice dated 22.11.2017."

3. The learned Single Judge did not find it fit to interfere in the matter and dismissed the writ petition vide judgment dated 02.04.2018. Hence, the appeal.

4. We have heard Mr. Rakesh Thapliyal, learned counsel for the appellant and Mr. Ranjan Ghildiyal, learned Brief Holder appearing for the respondents / State.

5. In the writ petition, no counter affidavit was called and it was decided at the admission stage. In the appeal, however, an affidavit has been filed in support of the prayer for vacating the interim order passed by the appellate court. Therein, it is INTER ALIA stated as follows:

"6. That it is relevant to point out here that the GST (Goods and Sales Tax) was introduced / made applicable w.e.f. 1.7.2017 in all over India, therefore, the department was not aware about the rate of GST while floating the tender, therefore, the department mentioned a clause in Standard Bidding Documents (SBD) stating therein that the contractors would submit their bids without adding GST. Meaning thereby the contractors submitted their bids without including GST. Not only this in this regard the contractors were required to submit affidavit / undertaking that the rates given by them are not included GST, therefore the petitioners submitted the affidavit stating therein that the rates quoted by him is not included GST. For kind perusal of this Hon'ble Court a copy of affidavit given by the contractors is being filed herewith and marked as Annexure No. CA-1 to this affidavit.

7. That in regard to GST, Engineer-in-Chief & Head of Department, Public Works Department, Dehradun vide circular dated 17.2.2018 clarified that for the work of construction of buildings, the calculation would be done as per DSR including GST. In other words in the Departmental Technical sanction rates the GST would also be included. Apart from above for the work of building construction, a meeting was held on 14.2.2018 in the chairmanship of Secretary, Planning, Uttarakhand, Dehradun, in which the decision was taken that along with DSR 2016 the cost index, which was issued on 1.4.2016 would be applicable till further orders. The net effect of the aforesaid order was that the cost index was remained only 1.96%. For kind perusal of this Hon'ble Court a copy of order dated 17.2.2018 and 14.2.2018 are being filed herewith and marked as Annexure No. 2 & 3 to this affidavit.

8. That for disposal of the work in regard to the aforesaid tender, after calculating the relevant things, the technical sanction was given on 5.3.2018 by the Chief Engineer, Tehri Region, Public Works Department, Tehri. As per technical sanction the rate of department were 3,96,39371.41, whereas the bid of the petitioner after adding 12% GST comes as 40,96,16,32.69, which is much higher to the departmental rates. It is relevant to point out here that the petitioner in his tender quoted the amount of Rs. 36602133.33 excluding GST. In this regard the comparative chart of the rates of department and other two

bidders i.e. M/s Kothari Associates and M/s K.K. Construction is prepared, which is being annexed herewith and marked as Annexure No. 4 to this affidavit."

6. There is also reference to Clause 35.1, which gives power to the employer to accept or reject any bid, INTER ALIA. It reads as follows:

"The Employer reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to Bidders. In case of annulment, all bids submitted and specifically, bid securities, shall be promptly returned to the Bidders."

7. Mr. Rakesh Thapliyal, learned counsel for the appellant, no doubt, would submit that the appellant had quoted his rate, which was inclusive of taxes. He would submit that, even adding the GST, it comes to a sum, which is fairly below the amount shown as the tender value for the contract. He would submit that the action of the respondents is arbitrary warranting interference by the writ court. He, no doubt, acknowledges that the Writ Court's jurisdiction in these matters is limited; but, he alleges exception to this case as, according to him, the action is arbitrary and he seeks to reinforce his contention with reference to the earlier tender, wherein the tender value is shown as ` 5 crores. Appellant has filed a rejoinder affidavit, wherein it is, INTER ALIA, stated as follows:

"There was no reason to take the technical sanction after publishing / uploading the tender as the earlier tender value of the respondents which was uploaded in the tender notice dated 22.11.2017 was Rs. 5 crores whereas the petitioners bid was much lesser than the tender value of 5 crores as the petitioner bid was Rs.3,66,02,133.33. Whereas the value of the fresh tender is also Rs. 4,45,00,000, which is much higher than the rate quoted by the petitioner / appellant i.e. Rs.4,09,61,632.69/- which is inclusive of 12% GST as this fact has already been admitted by respondent no. 4 in its paragraph under reply. The fact regarding pre technical sanction is itself proved from the Uttarakhand Procurement rules."

8. He would submit that this reinforces the fact that, even in the fresh tender, which is challenged, the amount is shown as ` 4,45,00,000/- and, therefore, there is no justification for the respondents in rejecting the case of the appellant, as the value fixed earlier being almost equivalent.

9. Per contra, Mr. Ranjan Ghildiyal, learned Brief Holder would support the action in terms of the affidavit filed in support of the Application for vacation of stay.

10. Article 14, undoubtedly, strikes at arbitrary action on the part of the State in all spheres of its activities. However, the application of the doctrine of arbitrariness does not have identical ramifications irrespective of the activity in which the State is engaged in. In the matter of distribution of largesse, which is what is involved in matters pertaining to award of contracts, while it is true that the State is not freed from the obligation to act in a fair manner, considerable

latitude is allowed to the State having regard essentially to the very nature of the activity involved. State, while it is engaged in commercial activities, is, undoubtedly, expected to act fairly; but, the State also cannot be deprived of free-play in its joints, which even a private individual would be entitled to. The only difference is that, unlike a private individual, State is not entirely free. The absoluteness, with which a private individual can conduct himself, subject no doubt to the laws of the land, is certainly not available to the State; but, at the same time, the writ court, when it is called upon to interfere in such matters regarding grant of contracts, would necessarily pose to itself the questions, whether it is in public interest that the Court should interfere; is a case necessarily required to be made out by the writ applicant, where a clear transgression of Article 14 is made out; and is the action so palpably unfair that the Court has no choice but to interfere? In other words, conflicting interest vie for acceptance before the Court and the Court must do a balancing act and it is only if it is found that there has been a clear violation of Article 14 that the Court should interfere.

11. In this case, we find from the records that the appellant has, indeed, given an affidavit at the time when it gave the tender to the effect that the rate, which it has quoted, does not include GST. The GST regime came into being on 1st July, 2017. There was some ambiguity regarding how the rates are to be worked out at the transition stage. It is, apparently, because of the same that the authorities did not want the rates to be quoted inclusive of GST. Later, after the authorities calculated the rates adding the GST, it is found that the amount quoted by the appellant is above the amount calculated by the technical estimate. It is, in such circumstances, that the authority has decided to go in for re-tender.

12. The case of the appellant appears to be that the appellant is found to be L-1. Learned counsel for the appellant also submits that there is a 'duty' to negotiate with person, who has quoted the lowest rate and, therefore, also having regard to the fact that the amount of the tender value shown is above what is found to be the appellant's rate including the GST, the action is arbitrary.

13. As far as the appellant being L-1 is concerned, it is settled law that, by virtue of being the lowest tenderer, no legal right accrues to the appellant to demand that the State may enter into a contract with him. In fact, we have already adverted to a specific clause (35.1), which has been cited by the respondents. The clause gives clear power to respondents to reject the bid without assigning any reasons, which was admittedly accepted by the appellant as one of the conditions for bidding. Therefore, the action of the respondents in rejecting the bid cannot be said to be illegal.

14. Coming to the argument of the appellant that since his being determined as L-1, the Government should have negotiated with the appellant having regard to the power available to it, we would think that, undoubtedly, it only enables an employer, in an appropriate case, to negotiate with the lowest bidder in terms of the procurement rules; but, this cannot amount to be a mandatory duty on the

part of the employer to negotiate with the lowest bidder and, thereby, compelling the Government to enter into a contract with the lowest bidder. We may, in fact, note that under the Uttarakhand Procurement Rules, 2008, Rule 3(9) provides as follows:

"3. Fundamental Principles of Procurement:

(9) Negotiations shall be avoided. It may be conducted under exceptional circumstances with lowest bidder L-1 only and the reasons for such negotiations should be clearly recorded."

15. As far as the rate being below the tender value is concerned, we would think that this is a case, where the respondents have decided to employ a rationale, namely, that the amount, after addition of GST, is above the rate prepared by the technical committee. Though the appellant has sought to draw support from the statement made in the rejoinder affidavit, we would think that, bearing in mind the principles based on which judicial review is premised, we should not be detained by such aspects. In fact, we notice that, in the new tender, the amount has been reduced to ` 4,45,00,000/-, which is including the GST. We do not think that this is a case, where there is any compelling public interest also to interfere in favour of the appellant.

16. Consequently, the appeal fails and it is dismissed. No order as to costs. The Stay Vacation Application also stands disposed of.